

PUBLIC COPY

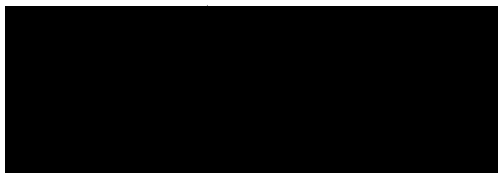
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

BA



U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

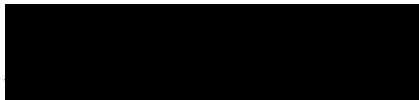
U.S. Citizenship
and Immigration
Services



FILE: EAC 02 180 53092 Office: VERMONT SERVICE CENTER

Date: APR 22 2004

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is an Italian restaurant and pizzeria. It seeks to employ the beneficiary permanently in the United States as a foreign food cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner submits additional information in order to show that it has the ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) also provides in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [CIS].

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's priority date is June 12, 1998. The beneficiary's salary as stated on the approved labor certification is \$483.20 per week or \$25,126.40 annually, based on a 40-hour week. The record indicates that the petitioner was established in 1997 and is organized as a corporation.

As evidence of its ability to pay, the petitioner initially submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 1998, 1999 and 2000. These tax returns show that the petitioner files its taxes based on a standard calendar year. They reveal the following information:

Year	Current Assets (Sched. L)	Current Liabilities (Sched. L)	Net Current Assets (Sched. L)	Ordinary Income
1998	\$ 4,179	\$14,606	-\$10,427	-\$12,015
1999	12,300	9,950	2,350	10,423
2000	17,975	26,070	-8,095	-3,643

The information presented on Schedule L of the petitioner's corporate tax returns reflects the petitioner's net current assets. CIS will review net current assets as part of the determination of a petitioner's ability to pay the proffered wage. Net current assets represent cash or cash equivalents that would reasonably be available to pay a beneficiary's proposed salary during the year covered by the balance sheet as shown on Schedule L of a petitioner's federal tax return.

On September 15, 2002, the director requested additional evidence from the petitioner in support of its continuing ability to pay the proffered wage from the priority date of June 12, 1998 to the present. The director specifically advised the petitioner to submit a copy of its 2001 federal income tax return, as well as any Wage and Tax Statement (W-2) issued to the beneficiary, showing the wages paid, if the petitioner employed him during any of the relevant period from 1998 through 2001.

The petitioner responded by submitting a copy of its 2001 corporate tax return and a copy of the principal shareholders' individual 2001 tax return. The 2001 corporate tax return indicates that the petitioner declared an ordinary income of \$14,180 and net current assets of -\$9,350. The petitioner also submitted an undated note stating that the beneficiary had been employed part-time by the petitioner and was paid "for living expenses." The petitioner concludes that "there are no copies of W-2s and Tax Statements, as beneficiary has no social security number."

The director denied the petition, determining that the petitioner had not established its ability to pay the proffered wage as of the priority date of the visa petition and continuing until the present. The director reviewed the petitioner's net income for each of the relevant years and found that the petitioner's net income in each of the years was insufficient to cover the beneficiary's proffered wage. The AAO concurs and notes that the petitioner's net current assets were also insufficient to pay the beneficiary's proffered wage in each of the pertinent years. As the petitioner provided no credible evidence corroborating that it paid the beneficiary a specific salary during a designated period of time, credit cannot be given for wages already paid to the beneficiary. Nor can the shareholders' 2001 individual joint tax return be considered in evaluating the petitioner's ability to pay the proposed salary. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980).

On appeal, the petitioner submits a statement of revenue and expenses covering a ten-month period ending October 31, 2002. Although it shows a net income of \$34,005 for this period, the statement appears to be an internally generated document, which cannot be accorded much evidentiary value as it is based solely on management representations of the petitioner's financial status. The regulation at 8 C.F.R. § 204.5(g)(2) requires either federal tax returns, annual reports or *audited* financial statements. (Emphasis added.) It is also noted that the ability to pay must be established as of the visa priority date and continuing until the present, rather than during selected, isolated periods of time. 8 C.F.R. § 204.5(g)(2).

The petitioner additionally submitted a copy of a CIS decision, dated November 22, 2002, denying the beneficiary's Application for Temporary Protected Status and a statement from the beneficiary asserting that he has been in the U.S. since 1998 and wants to remain. As this information is not relevant to the determination of the petitioner's ability to pay the proffered wage, it need not be considered.

Based on the evidence contained in the record and after consideration of the financial data further presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.